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No. 91-471

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

CHEMICAL WASTE MANAGEMENT, INC., PETITIONER

v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA;
ALABAMA DEPARTMENT OF REVENUE; and JAMES
M. SIZEMORE, JR., COMMISSIONER OF THE ALABAMA
DEPARTMENT OF REVENUE, RESPONDENTS

On Writ of Certiorari to the
Supreme Court of Alabama

BRIEF FOR
AMERICAN TRUCKING ASSOCIATIONS, INC.
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a tax that discriminates on its face against interstate commerce violates the Commerce Clause.

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INTEREST OF THE AMICUS CURIAE

American Trucking Associations, Inc. (ATA) is the national trade association of motor carriers, state trucking associations, and national trucking conferences, created to promote and protect the interests of the trucking industry. A significant proportion of ATA's members transport hazardous waste or other hazardous materials in interstate commerce. They are therefore affected directly by discriminatory taxes such as the one at issue in this case. Indeed, ATA has successfully challenged under the Commerce Clause a state hazardous materials transportation fee that discriminated against interstate commerce,

relying on some of the very arguments rejected by the Supreme Court of Alabama in this case. *ATA v. Secretary of State*, 595 A.2d 1014 (Me. 1991). Several similar challenges are now pending against fees imposed by other states. *ATA v. New Hampshire*, No. 89-E-00405-B (N.H. Super. Ct., Sept. 27, 1989) (escrow order); *ATA v. Nessen*, No. C.A. 91-7048A (Mass. Super. Ct., filed Oct. 21, 1991); *ATA v. Cowan*, No. TX91-01608 (Ariz. Tax Ct., filed Nov. 27, 1991).

Moreover, ATA and its members frequently—and often successfully—challenge other types of state taxes on Commerce Clause grounds. *E.g.*, *ATA v. Scheiner*, 483 U.S. 266 (1987); *ATA v. Goldstein*, 541 A.2d 955 (Md. 1988); *Kentucky v. ATA*, 746 S.W.2d 65 (Ky. 1988). ATA accordingly has a strong interest in the legal standards governing such actions.¹

INTRODUCTION AND SUMMARY OF ARGUMENT

The Alabama waste disposal tax at issue in this case discriminates on its face against interstate commerce. The tax applies only to waste generated outside Alabama. Waste generated within the State is entirely exempt from the tax. A long line of decisions invalidating facially discriminatory state taxes (*e.g.*, *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984); *I.M. Darnell & Son v. City of Memphis*, 208 U.S. 113 (1908); *Guy v. City of Baltimore*, 100 U.S. 434 (1880)), as well as this Court's decision in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), leaves no doubt that such facial discrimination

¹ Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court. See Sup. Ct. R. 37.3.

against interstate commerce in waste violates the Commerce Clause.

This brief discusses two aspects of the Alabama Supreme Court's reasoning that are particularly troubling. First, that court concluded that discrimination against interstate commerce does not violate the Constitution when the state's purpose is to protect public health, safety, and the environment. If adopted by this Court, this "exception" would swallow the Commerce Clause's antidiscrimination principle.

A vast number of substances can be characterized as threatening public health or the environment. Indeed, pursuant to his authority to regulate transportation of hazardous substances, the Secretary of Transportation has designated more than 2,000 commodities as "hazardous." The list includes such items as motor vehicles, nail polish, and mothballs. Under the Alabama Supreme Court's rationale, discriminatory taxes or regulations would presumably be permissible with respect to all of these products. That would result in the precise sort of economic warfare among the states that the Commerce Clause was expressly intended to prevent.

Second, the Alabama Supreme Court's analysis points up a more general problem in Commerce Clause litigation in the lower courts. Although this Court has never upheld a facially discriminatory tax against a Commerce Clause challenge (other than taxes found to be "compensatory" and therefore nondiscriminatory), lower courts are expending large amounts of time and resources considering whether such taxes may be justified on the ground that they are the least discriminatory means of promoting some legitimate governmental interest. The Court should make clear that in the context of facially discriminatory

taxes, as opposed to regulations, this inquiry is unnecessary. Alternatively, the Court should point out that only in an extremely rare case will such a facially discriminatory tax survive Commerce Clause scrutiny.

ARGUMENT

THE DISCRIMINATORY \$72 TAX VIOLATES THE COMMERCE CLAUSE

The unconstitutionality of Alabama's facially discriminatory tax is, we submit, indisputable under this Court's Commerce Clause decisions invalidating state tax laws that discriminate on their face against interstate commerce. In addition, it is impossible to distinguish *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), which expressly held that the Commerce Clause bars a state from discriminating in favor of in-state waste and against interstate waste. That decision, which has been interpreted by every lower court but the Alabama Supreme Court to invalidate facially discriminatory statutes analogous to the \$72 tax (see Pet. 15-17), plainly requires reversal of the decision below.

Rather than repeating petitioner's explanation of the applicability of *City of Philadelphia*, we focus here on two aspects of the Alabama Supreme Court's reasoning that have broad implications for this Court's Commerce Clause jurisprudence. First, we address the lower court's apparent conclusion that a state has greater authority to discriminate against interstate commerce if its action has some link to protection of public health and safety. Second, we explain why the Court should take this occasion to clarify the legal standard that applies in determining whether a facially discriminatory tax violates the Commerce Clause.

A. Commerce Clause Protection For Goods That Move In Interstate Commerce Should Not Be Limited On The Basis Of A Particular State's View Of The "Dan- gerousness" Of The Goods.

The principal ground for the Alabama Supreme Court's decision is that a state may discriminate against interstate commerce if its motive is to protect the public health and safety. Repeatedly referring to the public health and safety risks that it believed to be posed by hazardous waste (see Pet. App. 44a, 45a, 46a), the court concluded that Alabama's interest in protecting against those risks justified the discriminatory tax (*id.* at 44a-45a). Indeed, the court all but acknowledged (*id.* at 41a-42a) that state action motivated by a different state interest—such as the desire to protect local industry—would have been constitutionally impermissible.

Although the majority of the court below purported to assume that hazardous waste constitutes an article of commerce protected by the Commerce Clause (Pet. App. 41a), one Justice did conclude that, because of the potential threat to the environment, hazardous waste is not an article of commerce entitled to Commerce Clause protection (*id.* at 48a).² Of course, both approaches lead to precisely the same result: they permit states to justify virtually any measure that discriminates against interstate commerce simply by invoking an interest in protecting public health and safety against risks supposedly arising from the particular substance.

Both of these arguments were considered and rejected by this Court in *City of Philadelphia*. In holding that solid waste is an article of commerce pro-

² Respondents apparently intend to press the latter argument before this Court. Hunt Br. in Opp. 11-13.

tected under the Commerce Clause, the Court expressly rejected the contention that “innately harmful articles ‘are not legitimate subjects of trade and commerce,’” holding instead that “[a]ll objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset.” 437 U.S. at 622 (citation omitted). And the Court specifically held that the subjective motivation that led to enactment of the discriminatory statute is constitutionally irrelevant: “it does not matter whether the ultimate aim of [the statute] is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution * * *. But whatever New Jersey’s ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.” *Id.* at 626-627. *See also New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 279 n.3 (1988) (goal of protecting public health cannot justify “patent discrimination against interstate commerce”).

The Alabama Supreme Court’s position is more than just legally insupportable, however. It also would produce dire consequences, fostering the very “anarchy and commercial warfare between the states” that the Commerce Clause was intended to prevent. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949). *See also Hughes v. Oklahoma*, 441 U.S. 322, 325-326 (1979) (the Framers believed that, “in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation”). Accepting the proposition underlying the de-

cision below—that the states are free to discriminate against any out-of-state commodity that can reasonably be classified as harmful to public health, safety, or the environment—would effectively eliminate Commerce Clause protection for a very large portion of the Nation’s interstate commerce, opening the door to a crazy quilt of discriminatory restrictions that would paralyze interstate commerce.

Hazardous waste is not the only substance moving in interstate commerce that poses an arguable threat to public health and safety. As part of his authority to promulgate regulations for the safe transportation of “hazardous materials,” the Secretary of Transportation is authorized to designate materials as “hazardous.” 49 U.S.C. App. § 1804(a)(4)(B)(i). The Secretary has determined that more than 2,000 materials fall within this classification. *See* 49 C.F.R. § 172.101. And because the Secretary has identified many hazardous materials generically (*i.e.*, “Air conditioning machine”), and many others without specifying the myriad forms in which they may exist (*i.e.*, “Di(4-tert-butylcyclohexyl) peroxydicarbonate, * * * n.o.s.”³), this figure under-represents the actual number of commercial articles deemed hazardous.

The volume of traffic in hazardous materials, much of it interstate, is enormous. The federal government estimated that over 1.5 billion tons of hazardous materials were transported in the United States during 1982 (the last year for which data are available). *Transportation of Hazardous Materials* 3-4, U.S. Congress, Office of Technology Assessment, OTA-SET-304 (Government Printing Office, July 1986). More than 60% of that amount was transported overland

³ “N.o.s.” means “not otherwise specified.”

by over 467,000 trucks travelling 1.6 billion truck-miles (*id.* at 4, 49).⁴ Furthermore, a significant amount of hazardous materials transportation is interstate (see *id.* at 22), and the principal routes for transport are the interstate highways (*id.* at 111). These facts establish beyond any doubt the interstate nature of the transportation of hazardous materials.

The materials that the Secretary of Transportation has designated as hazardous touch an incredibly broad range of commercial activities. As one might expect, many of the materials designated as hazardous are chemicals. But the list encompasses a wide variety of other substances. From insecticides to motor vehicles, from medicines to mothballs, and from refrigerators to cigarettes, nail polish, batteries and paint, the list of hazardous materials reaches deeply into everyday business and consumer life. See 49 C.F.R. § 172.101. Of the vast amount of hazardous materials that are transported interstate daily, *less than 1% is hazardous waste. Transportation of Hazardous Materials* at 41 n.*. Yet the health concerns advanced to block hazardous waste at Alabama's borders could easily be invoked to block any other hazardous material.

And there is no reason that the states would be limited to articles designated as "hazardous" under federal law. Here, for example, Alabama's discriminatory tax applies to any type of waste—hazardous or nonhazardous—that is disposed of at a commercial

⁴ The 1982 statistics reflect a 43% growth in fleet size and a 23% growth in truck miles from data compiled in 1977. *Transportation of Hazardous Materials*, *supra*, at 49. It is reasonable to believe that the figures for 1991 would far outstrip those contained in the 1982 survey.

hazardous waste disposal facility. As long as a state could defend as rational the determination that the commodity in question poses some threat to public health or the environment, it presumably would be entitled to discriminate against interstate commerce in that commodity.

Many ordinary commodities—such as power saws, nails, kitchen knives, thermometers (which contain mercury), mirrors, and drinking glasses—could be characterized as posing a danger to public health and safety if spilled during transportation or used incorrectly by the public. Under the Alabama Supreme Court's rationale, a state would presumably be free to impose a discriminatory tax on any of these commodities.

Commercial warfare between the states is inevitable if a state may discriminate against interstate commerce by restricting an out-of-state hazardous material while countenancing the same material if it is generated within the state. States could easily favor local producers or users of "hazardous" materials, under the guise of health and safety concerns, by restricting the importation of those materials from other states on the ground that those materials pose "special" risks to its own citizens. For example, a state could prohibit the importation of cement (a hazardous material) from neighboring states while allowing its own cement makers to operate unfettered. The possibilities for protectionism and disruption of interstate commerce would be endless.

In short, the decision of the Alabama Supreme Court should be reversed not only because it flatly contradicts established Commerce Clause precedent, but also because it would destroy the national econ-

omy. States could exploit any such loophole in the Clause's antidiscrimination principle to impose a disparate burden on any of the thousands of hazardous materials that are transported interstate. The resulting web of discriminatory, protectionist legislation would yield exactly the kind of economic balkanization condemned by the Commerce Clause. Because the step taken by the Alabama Supreme Court portends a catastrophic fall down the slippery slope of protectionism, this Court should refuse to carve out an exception to the Commerce Clause for "hazardous" goods.

B. This Court Should Make Clear That A Tax That Discriminates On Its Face Against Interstate Commerce Will Pass Constitutional Muster Only In Very Unusual Circumstances.

State laws that discriminate on their face against interstate commerce almost always violate the Commerce Clause. Indeed, this Court has characterized the Clause as erecting "a virtual[] *per se* rule of invalidity" with respect to such statutes. *City of Philadelphia*, 437 U.S. at 624. A court must engage in "the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979). The state's burden of justification is "high." *New Energy Co.*, 486 U.S. at 278. *Accord*, *Wyoming v. Oklahoma*, 112 S. Ct. 789, 800 (1992).

Aside from the few cases in which the Court has upheld a facially discriminatory tax on the ground that it compensates for a tax applicable solely to interstate commerce, and therefore is not in substance discriminatory (*see, e.g., Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937)), we are not aware of any

case in which the Court has upheld a tax that discriminates on its face against interstate commerce. Rather, such statutes are routinely invalidated. *See, e.g., New Energy Co., supra; Tyler Pipe Indus., Inc. v. Washington State Dep't of Rev.*, 483 U.S. 232 (1987); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984); *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977); *I.M. Darnell & Son v. City of Memphis*, 208 U.S. 113 (1908); *Walling v. Michigan*, 116 U.S. 446 (1886); *Guy v. City of Baltimore*, 100 U.S. 434 (1880); *Welton v. Missouri*, 91 U.S. 275 (1876).

Prior to its recent decision in *New Energy Co.*, this Court typically held facially discriminatory taxes invalid under the Commerce Clause without inquiring whether the state could somehow justify the discrimination. In *New Energy Co.*, the Court considered—apparently for the first time in the context of a facially discriminatory tax (as opposed to a facially discriminatory regulation)—whether the discrimination against interstate commerce might be justified because the tax "advance[d] a legitimate local purpose that [could not] be adequately served by reasonable nondiscriminatory alternatives" (486 U.S. at 278). The Court held in *New Energy Co.* that the state had not met that standard. As we have discussed, the same conclusion is warranted in this case.

We question whether this inquiry is appropriate in the context of facially discriminatory taxes. A state will virtually always have an available nondiscriminatory alternative: a facially neutral tax. If a state is truly motivated by a legitimate purpose, rather

than by the desire to discriminate against out-of-state goods, it should be able to draft its tax statute by setting forth the characteristics of the class of goods subject to the tax. There simply is no reason to allow the states the option of framing a tax in discriminatory terms (where the statute does not satisfy the exemption for compensatory taxes discussed above).

This conclusion is supported by the practical consequences resulting from application of the *New Energy Co.* standard in the tax context. Pointing to the inquiry undertaken by this Court in that case, state and local governments have argued that even facially discriminatory taxes may not be struck down under the Commerce Clause without lengthy and expensive trials. Thus, in this case, Alabama persuaded the trial court to deny petitioner's summary judgment motion and conduct a four-day trial on the ground that there was a factual issue as to whether the discrimination could be justified under the *New Energy* test. (The court found no justification for the discrimination. Pet. App. 86a-88a.) This approach drains the resources of the parties and of the judicial system, and, because it may tend to encourage an open-ended inquiry into the state's reasons for enacting the statute, increases the chances that an unconstitutionally discriminatory law will erroneously be upheld. That is precisely what happened here.

This Court therefore should consider eliminating the inquiry into potential justifications in the context of facially discriminatory taxes. Alternatively, the Court should clarify the governing legal standard by expressly reminding the lower courts that facially discriminatory taxes almost always violate the Com-

merce Clause. That guidance will enable lower courts to more easily and accurately adjudicate challenges to state taxes under the Commerce Clause.

CONCLUSION

The judgment of the Supreme Court of Alabama should be reversed.

Respectfully submitted.

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